IN THE

SUPREME COURT OF THE UNITED STATES

No. 211

W. R. KELLEY, *Petitioner and Appellee Below*

vs.

UNION TANK AND SUPPLY COMPANY,
Respondent and Appellant Below

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Supreme Court of the United States:

Your Respondent, Union Tank and Supply Company, respectfully opposes the petition of W. R. Kelley, petitioner, for a writ of certiorari in the above numbered and entitled cause, and in support of its opposition, submits the following brief:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

The summary statement in petitioner's brief, pages 2-7, contains some inaccuracies and omissions, which we desire to here correct.

On page 5 of Petitioner's brief, he states:

> "The Plaintiff had never before unloaded any steel of this particular type, and he testified that

since he had been requested to move the steel *by Mr. Head*, who had been working in the car that he presumed that it was safe to get in the car and take the steel out." (Rec. p. 49.)

This statement is not a correct quotation of the record. The record is as follows:

"Q. What did you see there concerning the stack?

"A. The steel was leaning there against the car, and I had no idea it could be dangerous from the way it was stacked.

"Mr. Crenshaw: We object to the witness' statement about his ideas.

"The Court: Just state what you saw, what the true situation was.

"A. The steel staves were leaning against one wall. As I had been told it had to be moved, I presumed it was safe to get in and take the steel out." (Rec. pp. 48-49.)

It will be noted that the witness did not say that he had been told by Mr. Head to move the steel. On page 47 of the Record, the witness testifies as follows:

"Q. Had you had any direct conversation with Mr. J. O. Head at all?

"A. No, sir.

"Q. You, yourself?

"A. No, sir.

"Q. Had Mr. Head said anything to you at all about the work?

"A. No, sir." (Rec. p. 47.)

This same statement of petitioners is repeated in the

last paragraph on page 47 of his brief to the effect that Head ordered him to finish unloading the car at night, which equally is unsupported by the testimony. There are other inaccurate statements made by petitioner in his brief supporting his petition for the application for the writ of certiorari, which we will not undertake to here correct, but will call to the Court's attention in our repy to such propositions and arguments.

We believe that in the notes subjoined to the opinion of the Honorable Circuit Court of Appeals for the Fifth Circuit, a fair and sufficiently comprehensive statement is made of the salient facts, and since the petitioner does not in his brief in any way question the accuracy of this statement, that we may simply refer to such a statement, and make it a part of this brief, without the necessity of here recopying same. We therefore here refer to and adopt the statement of the record facts as contained in notes subjoined to the opinion of the Honorable Circuit Court of Appeals as a correct statement of the salient facts shown by the record in this case, and ask the Court to consider the same.

We believe, however, it will aid the Court to a clearer understanding of the situation if we briefly inform the Court just how this carload of tank steel was loaded; how the supports were arranged; the usual and customary manner of unloading; and what the petitioner's version of the accident was:

The tank steel being unloaded consisted of sheets of steel from one-eighth (1/8) to three-sixteenths

(3/16) inches in thickness, the weight of which was variously estimated at from 185 to 235 pounds (Rec. p. 169.) Petitioner Kelley testified that each sheet weighed approximately 500 pounds (Rec. p. 60.)

The usual and customary way of loading the steel for shipment in a box car was as follows:

That a 2 x 4 or 2 x 6 or 4 x 4 timber would be nailed against the end wall of the car at about four feet above the floor; that the sheets of steel were about five feet by eight feet, and slightly curved, and that each end had a chine or flange at a 90° angle to the sheet with holes near the top and bottom. That a sheet would be taken into the car and set upon its edge with the eight foot length of the sheet running parallel with the side walls of the box car, and a nail would be driven through one of the upper holes in the flange and into the timber that had been nailed across the back end of the car to fasten the sheet in an upright position. That this process would be pursued until the sheets filled the car from one side of the car to the other; every other sheet being nailed to the timber at the back end of the car. That then, at the end of the sheets, toward the center of the car, a 4 x 4 timber would be nailed into the side walls of the car, across the car, at a point about four feet above the floor, and a nail would be driven through one of the upper holes in the flange in the upper end of the sheets into the 4 x 4 to keep the sheets in an upright position, and also at the bottom of the ends of the sheets, toward the center of the car, a piece of timber would be nailed on the floor across from one side wall to the other to

prevent the sheets from slipping back and forth lengthwise in the car (see testimony of Hobson, Rec. pp. 169-171).

That the usual and customary method of unloading the sheets of steel was to tear out the timbers in the front, or toward the center of the car. That after that was done, it was usual and customary to start unloading the sheets from one side of the car, and take the sheets out one at a time. That in order to break the sheets loose from where they were fastened to the timber at the back end of the car, the workman would take a hook and put it in one of the bottom holes of the flange at the front end of the sheet, and lift the front end up about a foot high, and then let it drop back down, which would ordinarily pull the nail out at the back end of the sheet, and the workman would then pull the sheet toward the center of the car. That if this procedure did not pull the nail out, the usual and customary method was for the workman to go over the top of the sheets to the back end and pull the nail with a claw-bar. That the only way these sheets could fall on a workman and pin him against the side of the car would be for the workman, after he had unloaded a number of the sheets, to go in between the remaining sheets and the side of the car. (Rec. pp. 172-174.)

As to the condition of the steel in the car at the time Appellee went to work there, there is an irreconcilable conflict in the testimony. Appellee's witness, Joe Head, testified that before Appellee went to work in the car that he, Head had gone in there and torn out all of the supports around the tank steel in the end of the car,

leaving it free to fall or to be handled. (Record pp. 106-107.) That he tore out the 4 x 4 that was at the front end of the staves (Record page 130) and that the 2 x 6 at the back end was not against the end of the car, but was out some eighteen to twenty inches from the back end of the car (Record page 133); and that he crawled over the staves or steel sheets and took the 2 x 6 out from the back end and pulled loose the nails that held the steel sheets to this 2 x 6 (Record p. 134), leaving the staves without any nails holding them at either end.

Petitioner Kelley testified that when he and his fellow worker (a Mexican) started unloading these sheets of steel, that they would take their hook and put it in the hole close to the bottom at the front end of the sheet and pull the sheet of steel up and break it loose at the back end of the box car and drag them out. That there was a nail driven through the flange and into the 2 x 4 at the end of the car. That he saw the whole situation and knew the 2 x 4 was back there (Record page 65); that some of the sheets were nailed into the 2 x 4 at the back end of the car, and some were not. That he saw those that were nailed and saw some that were not nailed (Record pp. 67-68). That at the time he got hurt, he had gone back into the car to pull the nail out of the sheet of steel and was coming back toward the front end of the car when the steel fell and lodged him against the side of the car. (Record p. 49.) Bruce Wimberley, a witness for Respondent, testified that the sheets of steel were nailed to a 2 x 4 at the back end of the car, and there was a 4 x 4 at the front or east end of the car, the 4 x 4 being toward the top

of the steel, and that at the bottom of the sheets a 2 x 4 or 4 x 4 was nailed to the floor at the front end of the sheets. That the 4 x 4 at the top in front of the sheets was nailed in pretty solid, and he and Kelley and the Mexican pulled it out with a winchline that was on his truck, and that the timber at the bottom of the steel sheets at the front end was pried up with a bar, and that Kelley and his helper did that work. (Record page 185.) This testimony of Wimberley was not denied by Petitioner, Kelley. Wimberley further testified that he was there off and on all the time that Kelley and his helper were working in the car, and that Kelley and his helper in unloading the car would pull the sheets loose where they were nailed to the cross-piece at the back or west end of the car. (Record page 186.)

Petitioner, Kelley, testified that the steel he was unloading was at the east end of the car (Record page 60), whereas Petitioner's witness, J. O. Head, and Respondent's witness, Wimberley, both testified that the steel Kelley was unloading at the time he was injured was in the west end of the car. (Record page 120 and 182-183.) In using the words "East" and "West" in the preceding paragraphs, we are not attempting to resolve that conflict in the testimony, but merely adopting the testimony of Head and Wimberley as to location of steel in the car merely for convenience in making a clear description of the points where the braces or supports were located.

Petitioner, Kelley, in addition to the portions of his testimony hereinabove set out testified in substance

that he was approximately twenty-eight (28) years of age at the time of the accident. That on the day of the accident he was working for Bruce Wimberley unloading some tank steel from a boxcar. That he had never unloaded any tank staves from a boxcar before. That he had been working for Mr. Wimberley approximately a month or better at the time of the accident. That he went into the car with a Mexican helper to unload the steel and that at the time of the accident they were both tired and were trying to get the steel out as soon as possible. "They had nailed the steel. It was back in the car, and I had gone back to pull this nail out of the sheet of steel, coming to the front end of the car. Before I got to the front the steel fell and lodged me against the opposite side of the car." (Record pp. 45-49.) That during the month or more before the accident, while he had been working for Wimberley, he had been hauling pipe mostly. That some of the pipe would be heavy and some medium weight. That he also moved many heavy pieces of machinery, some much heavier than the sheets of steel he was moving at the time of the accident. That he had also worked for another trucking concern before going to work for Wimberley, and had been engaged in the business of hauling in the oil fields approximately a year prior to the accident. That he had also had experience working as a roughneck in the oil fields, keeping the machinery oiled and greased, keeping the rig clean, and filling in on the other heavy work, such as tearing down rigs and putting rigs up. (Record pp. 53-55.) That about noon on the day he got hurt, Wimberley told him he had a job unloading the car, and

told Appellee and the Mexican to go down and start unloading the car. That they went down around 1:30 in the afternoon. That he and the Mexican went in under Wimberley's orders to unload the car, and there was no one else present. That at the time he started unloading, he could not get in on either side of the steel. That when they started, they would put hooks in the holes in the sheet and pull them out and then take them over and put them in the truck. That the way they broke them out would be to put the hook in a hole close to the bottom, pull the sheet up, break them loose from the end of the car and take them out. That there was a nail through the steel into the 2 x 4. That he knew the 2 x 4 or 2 x 6 was back there, and they had to handle the sheets from the front. That as soon as they pulled out enough so that one of them could get back in there, he went in between the sheets and the side wall of the car eight or ten times before he got caught and hurt. That he had been back in there some eight or ten times in daylight and did not need any light to see the conditions there at that time. That some of the sheets were stuck into the floor of the car at the back end, and they would sometimes have to go back in there to break them loose. That some of the sheets were nailed to the 2 x 4 and some were not; that those that were nailed, he saw them nailed and he saw some that were not nailed into the timbers when he went back there in broad daylight. That as he took the sheets out he could see that they were leaning; that on their first load they carried, as he recalled, twenty sheets. That he had worked there from about 1:30 until the time he carried the first load up to the

yard of the Union Tank and Supply Company and unloaded it. That it was about dusk when they left the supply company yard, and he went by and got his supper, and waited for the Mexican to come back, and then went back for the remainder of the stuff. (Record pp. 59-68.) That when he went back to the car he found the unloaded portion of the material in the same condition as it was when he left. That Bruce Wimberley told him to work that night and finish unloading the car; that he lacked a small portion of unloading the car. That Joe Head was in a conversation with Wimberley about four o'clock in the afternoon, and Head was outside the car when Wimberley told Appellee to finish the car that night. That Head did not say anything direct to Appellee about the matter of unloading, but he heard him talking to Wimberley, telling Wimberley that it had to be unloaded that night. That when he went back there he had gotten two or three sheets on his truck before the accident took place. That when he went back to work that evening there was a light on the headache bar of the truck and he rigged up the light and turned it into the boxcar. That it was his own light and he had put it on the truck himself to use in just such occasions as this and trained it just where he wanted it to go. That with the light trained in there he saw how to get out the two or three pieces and then after that time he got caught between the side wall of the box car and the steel. That Mr. Wimberley and several other men came in and lifted the steel and got him out and into Wimberley's car. That at the time of the accident there were twenty-three (23) sheets of steel left in the car. That the

light that he had was not sufficient and he asked Mr. Wimberley to get him one, and Wimberley said he would ask Mr. Head. That Joe Head was not there at the time that he knew anything about. That after Wimberley said he was going to see Mr. Head, Appellee continued working there with the light that he had. That he would say that it was around 9:00 or 9:30 o'clock when he got back to the car and was after dark. That it was pitch dark in the box car. That after he had trained his light it was still too dark to work in there, but that despite the fact that he knew he did not have adequate light, he went in there and got caught. (Rec. pp. 69-82.) That at the time of his asking Mr. Wimberley about the light, he had not seen Mr. Head around there since about 4:00 o'clock that afternoon, and that Mr. Head was not around there at the time of the accident and that Mr. Head had not been around for about six hours before the accident. (Rec. p. 98.)

II.

PROPOSITION I

ANSWERING SUBDIVISION "A" OF SECTION VI APPELLEE'S BRIEF (pp. 38-40)

The evidence without dispute showing that no representative, agent or employee of respondent, or its predecessor, Crawford Tank and Supply Company, was present at the car where the accident occurred for more than four (4) hours preceding the accident, and there being no showing that at the time the representative of Crawford Tank and Supply was present at the car some four (4) hours or more prior to the accident, that he saw or observed Petitioner in any then imminent or impending peril, the evidence was wholly insufficient to authorize the submission to the jury of the issue of discovered peril or to support a jury verdict based thereon; and the Honorable Circuit Court of Appeals correctly so held.

STATEMENT

There was no evidence that any agent or representative of the Crawford Tank and Supply Company, the predecessor of respondent herein, Union Tank and Supply Company, was present at the scene of the accident at the time of or for some hours preceding the accident, or that any agent or representative of said company saw the plaintiff at the time of or as he was proceeding to go in between the sheets of steel and the side of the car, or that at the time Head, the representative of Crawford Tank and Supply Com-

pany, was at the car, according to his testimony, about 7:30 in the afternoon, and some three or more hours before the accident, that he saw or observed Kelley at any time go in between the sheets of steel and the side of the car.

The evidence, on the contrary, shows affirmatively that none of the agents or representatives of the company were present or saw the Appellee at or shortly before the accident.

Apparently the only two representatives of Crawford Tank and Supply Company were J. O. Head and Jerry E. Hobson (see Record). There is no evidence that Hobson was ever at the car involved in the accident at any time. (See Record.)

The Appellee, Kelley, testified "that the accident happened at approximately 10:30 P. M. the night of April 27." (Rec., second Q. and A. from top of p. 46.)

Appellee, Kelley, further testified as follows:

"Q. You asked who about getting more light?

"A. Asked Mr. Wimberley.

"Q. You had not seen Mr. Head around there at all since about 4:00 o'clock that day?

"A. No, sir.

"Q. Had you?

"A. No, sir.

"Q. Following up that last question, Mr. Head, Mr. J. O. Head, or Joe Head, was not present in the box car or around there at the time the accident happened, and had not been in that box car or around there for several hours, had he?

"A. He was not around there at the time of the accident, No sir.

"Q. And it had been several hours before that time? If it happened, if the accident had happened about 9:30, Mr. Head had not been around there since 4:00 o'clock that afternoon, had he?

"A. The accident happened approximately about 10:30, and I had not seen Mr. Head in quite some time myself.

"Q. Well, about six hours had elapsed, is that right?

"A. Approximately that long." (Rec. p. 98.)

Petitioner's witness, J. O. Head, testified as follows:

"Q. Now after he undertook and began unloading did you go back there at any time?

"A. Yes sir.

"Q. Did they, to your knowledge, or not, work during the night time.

"A. I quit about 7:00 or 7:30 on the car I was working on, went by there, and they were still working, and they came after their third load, was backed up to the car—second load I mean to say instead of the third load. I stopped by to see how they were getting along, and they lacked a load of staves of having them out, and I told them to go ahead and finish them.

"Q. About what time?

"A. As well as I remember, around 7:00 or 7:30." (Record p. 106.)

The same witness further testified as follows:

"Q. And when this accident took place, were you there?

"A. No, sir.

"Q. How long had it been since you had seen

Kelley and Wimberley or the car if you know?

"A. From about 7:30 until about—I will say 7:30 the next morning.

"Q. You didn't know anything about the accident that night, did you?

"A. No, sir.

"Q. And you were not around there at any time that night.

"A. No, sir." (Rec. pp. 121-122.)

ARGUMENT

It is settled law in this State that before the doctrine of discovered peril can have any application the evidence must show that the defendant or its agents actually discovered the plaintiff's perilous condition. It is not enough that they should have discovered the perilous condition, but failed to do so, but there must be an actual discovery by the defendant or its representatives of the perilous condition of the plaintiff in time that they can, by the exercise of reasonable care, have avoided the accident.

Turner vs. Texas Co., et al., 159 S. W. 2d, 112 (Sup. Ct.).

Panhandle & Santa Fe Ry. Co. vs. Napier, 143 S. W. 2d, 754.

East Texas Theatres, Inc. vs. Swink, 177 S. W. 2d 195.

Texas & P. Ry. Co. vs. Breadow, et al (Sup Ct.) 36 S. W. 410.

Texas & P. Ry. Co. vs. Staggs, et al (Sup Ct.), 39 S. W. 295.

In *Turner vs. Texas Co.*, supra, the Commission of Appeals in an opinion adopted by the Supreme Court thus expresses the rule in Texas:

> "Actual discovery of the perilous position of the plaintiff is essential to recovery. It is not enough that the one inflicting the injury should have discovered the peril of the person injured or that he was negligent in not discovering it. Associate Justice Denman in Texas Pacific Railroad Company vs. Breadow, 90 Texas, 26, 31, 36, S. W. 410, 412, states this rule as follows: 'the principle, however, has no application in the absence of actual knowledge on the part of the person inflicting the injury, of the peril of the party injured in time to avoid the injury by the use of the means and agencies then at hand. If he had no such knowledge, the new duty was not imposed, though it be clear that by the exercise of reasonable care he might have acquired same. The burden of proof was upon plaintiff in this case, in order to recover for a breach of such new duty, to establish, not that the employees might, by the exercise of reasonable care, have acquired such knowledge, but that they actually possessed it.'" (Citing Texas cases.)

It has been further held, and is settled law in the State of Texas, that in order to come within the definition of discovered peril, the peril of the injured party must have been imminent and impending.

In the case of *Texas & P. Ry. Co. vs. Staggs, et al*, the Supreme Court of Texas had before it a case where the railroad train operators discovered Staggs upon the track between a quarter and a half mile in front of the moving train. Complaint was made that the

employees of the railroad company failed to use ordinary care to discover, that the deceased would not leave the track in time to prevent injury to him, and the trial court charged the jury upon that theory. The Supreme Court reversed the ruling of the trial court, and held that discovered peril was not in the case.

In the case of *Texas & P. Ry. Co. vs. Breadow*, supra, the Supreme Court had before it the question of discovered peril, where the injured party was seen walking down alongside the railroad track, and contention was made that the issue of discovered peril was in the case. In answering this contention, the Supreme Court said that discovered peril was not in the case.

In the case of *Schaff vs. Gooch*, 218 S. W. 783, the Austin Court of Civil Appeals had before it a contention that discovered peril was an issue because the employees of the railroad company discovered the injured party walking near to the track and, therefore, they knew there was danger of his getting on the track.

The Court, in rejecting the contention that discovered peril was in the case, made this statement:

> "The rule of law is well settled in this State, that in order for a recovery to be had under the doctrine of discovered peril, which eliminates the defense of contributory negligence, it must be made to appear that the injured party was *in a position of imminent danger*, and that the defendant or those acting for him discovered the dangerous situation of the injured party in time to have averted the injury by the exercise of proper care."

In *Schaff vs. Copass*, 262 S. W. 234, the Austin Court of Civil Appeals, in passing on the question of whether the issue of discovered peril was in the case said:

> "The duty (of using care) thus imposed (by discovery of the peril) arises out of the immediate situation and is entirely independent of and aside from the causes which have created it."

In *Northern Texas Traction Company vs. Hill* (C. C. A.), 297 S. W. 778, (Writ of Error refused by Supreme Court), the Court held that "the doctrine of discovered peril defeats the defense of contributory negligence on the part of the plaintiff only when the danger arising therefrom is imminent, is actually discovered by defendant and may be arrested by means at the latter's command."

In the case of *W. A. Morgan & Bros., et al vs. Missouri, K. & T. Ry. Co. of Texas* (Sup. Ct.), 193 S. W. 134, the Court had this to say upon the issue of discovered peril:

> "It is unnecessary to enter upon an extended examination of the abstract question of whether the doctrine of discovered peril applies to the injury or the destruction of inanimate property, to which an elaborate and able written argument by counsel for the plaintiffs in error is largely devoted. With us, the doctrine defeats contributory negligence on the part of the plaintiff only when the danger arising therefrom is imminent, is actually discovered by the defendant, and may be averted by the means at the latter's command."

The mere fact that there was a possibility of injury to petitioner and that possibility was seen and realized by the representative of Appellee is not sufficient unless the danger was then imminent and impending. The fact that some three or four or more hours prior to the accident that a representative or respondent saw Kelley working in the car, without any proof that he saw him going in between the sheets of steel and the side wall of the car, is not such a discovery of imminent and impending peril as would invoke the doctrine of discovered peril or make it applicable to this case. It is plainly evident that as long as Kelley continued to get hold of the sheets at the front end, or the end toward the center of the car, and pulled them out toward him without going in between the sheets of steel and the side wall of the car, that he was in no danger of the sheets falling on him. Therefore, in order to show a discovery of any perilous condition, it would be necessary for the evidence to show that Head saw him go in between the sheets of steel and the side wall of the car. The record is completely silent on this feature, and there is no testimony showing that Head saw him at any time go between the sheets of steel and the side wall of the car. Therefore, if it could be said that the discovery of a perilous position three or more hours before the accident was such a discovery as would bring into play the doctrine of discovered peril, in this case there is no evidence at all upon which that theory can have any support. In the argument on the issue of discovered peril, petitioner states that Head's testimony was to the effect that he went by and told Wimberley *and*

Kelley to complete the work that night. This statement is not supported by the record. Head does not claim that he talked to Wimberley in Kelley's presence about working at night, and Kelley himself says that Head never gave him any orders whatsoever, or instructions whatsoever. (Rec. p. 69 where Kelley said that Bruce Wimberley was the man who told him to work at night.) Again in the fifth line from the end of Petitioner's argument on the issue of discovered peril, he states that Head, by refraining from *ordering Kelley* to continue to work under certain dangerous conditions in the night time, etc., this statement is likewise incorrect, as is shown by the above excerpts from the testimony.

We submit that the Honorable Circuit Court of Appeals correctly held that the issue of discovered peril was not in the case, and that the trial court erred in charging the jury thereon.

PROPOSITION II

ANSWERING SUBDIVISION "B" OF PETITIONER'S ARGUMENT, pp. 40-47 OF ITS BRIEF

The evidence was insufficient to authorize submission of the issue of negligence in failing to furnish a safe place to work, such as an adequately lighted place, and the Circuit Court of Appeals correctly so held.

STATEMENT AND ARGUMENT

We will ask the Court to consider hereunder the preliminary statement of facts hereinabove set out, and the statement of facts set out in Note 4 to the opinion of the Honorable Circuit Court of Appeals, the correctness of which has not in anywise been questioned by Petitioner herein.

Appellee alleged that he was a business invitee in the car in question by virtue of having been an employee of one Bruce Wimberley, who then and there had a contract to unload a car of steel for the Appellant. (Paragraph 3, Plaintiff's First Amended Original Petition, Rec. p. 27.)

The undisputed testimony of Wimberley and Head established that Wimberley was an independent contractor (Rec. pp. 104-105, and 181-182).

Under the decisions in Texas, the employee of an independent contractor is merely an invitee upon the premises, and the contractor does not owe him the duty of furnishing him a safe place to work.

In *Harrison vs. Harrison*, 100 S. W. 2d 780, the Court said:

> "In our opinion, the duty of an employer to provide an employee with reasonably safe tools and appliances, and a reasonably safe place in which to work is a duty incident to the relation of master and servant, employer and employee, and not to the plaintiff as an invitee."

In principal the foregoing rule is applied in the case of *Humble Oil & Refining Company vs. Bell, et al*, 180 S. W. 2d 970.

The Honorable Circuit Court of Appeals for the Fifth Circuit has apparently recognized this to be the Texas rule in the case of *Holt vs. Texas-New Mexico Pipeline Company* (C. C. A. 5th), 145 Fed. 2d 862, where it held that Holt, as an employee of the contractor, was an invitee upon the premises of the pipeline company. We think that this holding that the employee of an independent contractor is an invitee upon the premises of the contractee is also implicit in the decision by the Honorable Fifth Circuit Court of Appeals in the case of *Kuptz, et al vs. Ralph Sollitt & Sons Construction Company* (C. C. A. 5th), 88 Fed. 2d 533.

We believe the rule contended for by petitioner, that one who employs an independent contractor to do work on his premises, and surrenders control of the premises to the independent contractor, owes to the employees of such contractor the duty of furnishing them a safe place to work, is manifestly too broad. Certainly where one employs an independent contractor to construct a building, or to demolish a building, or to dig an excavation, or to move heavy materials in

and out, where the condition of the premises is constantly changing or the dangers are increased by the progress of the work, it would hardly be contended that the owner owes the servant of the independent contractor the duty of furnishing him a safe place to work.

We think the true rule is correctly announced in the case of *Armour & Co. vs. Dumas*, (C. C. A.), 95 S. W. 710 (Writ of Error denied by Supreme Court) where the Court said:

> "But it is insisted that the duty of exercising care to furnish a reasonably safe place to work, resting upon Appellant, was absolute and non-assignable. But to this general rule there is the well known exception that the master is not liable where the danger to which the employee is exposed is merely a transitory one, due to no fault of plan or construction, but is one where the work is of such a character that as it progresses the environment of the servant must necessarily undergo frequent changes, and the injury is traceable to one of those transitory changes."

In the case at bar, the evidence is undisputed that at the time Kelley began his work that he could not go in between the sheets of steel and the side wall of the car; that as the work progressed to where he had removed a sufficient number of sheets, he was then able to go in between the sheets and the side wall of the car. Up to that time, there was no danger of injury by the sheets falling. As the work progressed, and more sheets were removed, there was greater opportunity and danger of the sheets falling and catch-

ing Kelley between the sheets and the wall of the car. The danger which occasioned this injury arose as a result of the changing conditions of the work.

The rule contended for by Petitioner herein would put upon the person employing an independent contractor all the duties of the master toward the servant. In the case at bar, the contractee did not agree to furnish any materials or appliances or equipment and completely surrendered control of the car and its contents to Wimberley, the independent contractor, and his employees.

We believe it is a settled rule in this state, as shown by the authorities above quoted, and others not necessary to cite, that as between the contractee and the employee of the independent contractor, there merely exists the relation of the owner of the premises and of an invitee thereon.

This distinction is of importance, because the duties owed by the owner of the premises to an invitee are much less onerous than the duty owed by a master to his servant to furnish him a safe place to work.

The rule is very clearly stated in the case of *Crump vs. Hellams*, 41 S. W. 2d 288, and copied in Vol. 30, Tex. Juris., Section 184, page 870, as follows:

> "The mere ownership of land or building does not render one liable for injuries sustained by persons who have entered thereon or therein; the owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while right-

fully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. In the language of Mr. Justice Harlan, the owner is liable to invited persons for injuries 'occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them and was negligently suffered to exist without timely notice to the public, or to those who were likely to act upon such invitation.' And, hence, there is no liability for injuries from dangers that are obvious or as well known to the person injured as to the owner or occupant."

In the case of *Fort Worth & D. C. Ry. Co. vs. Hambright*, 130 S. W. 2d 436 (Writ of error dismissed), Hambright was an invitee on the premises of the railway company and slipped on some ice and was injured. The Court said:

"The only condition under which such an owner is liable to those whom he invites upon his premises are when dangerous and unsafe instrumentalities or conditions exist and are known to him, and not known to such invited persons, and they are injured by such instrumentalities and conditions. It follows that if a person is injured under such circumstances, and the instrumentality or condition by which he was injured is as obvious and well known to him as it is to the owner of the premises, no liability exists for such injury and the law will allow him no recovery therefor."

To the same effect see:

Shawver vs. American Ry. Express Company, 236 S. W. 800.

Crump vs. Hellams, 41 S. W. 2d 288.

G. H. & R. Ry. Company vs. McLain, 218 S. W. 65.

Texas & Pacific Ry. Co. vs. Howell, 117 S. W. 857.

In a very recent decision by the Supreme Court of this State, in the case of *Houston National Bank vs. Adair*, 207 S. W. 2d 374, where an invitee had fallen on a stairway in the bank, the Court held that where the evidence showed that the improper lighting of the stairs, the failure to cover or corrugate the stair tread, the absence of hand rails, and the fact that the balustrades on the sides of the stairs were too wide to be grasped from above were open, apparent and obvious to the bank's business invitee when she started down the stairs, necessitated a judgment for the defendant bank.

In *Hasuman Packing Company vs. Badwey* (C. C. A.), 147 S. W. 2d 856, it was held where the invitee who fell in descending from a truck where he had been invited to inspect some meat knew or by the exercise of ordinary care should have known that the truck floor was defective and slippery, that there was no hand hold at the rear of the truck, and only one step between the floor and the ground, that the owner was not liable for the injuries sustained by the invitee, since such defects were open ond obvious.

In principle, we think this rule is given application by the Honorable Circuit Court of Appeals for the Fifth Circuit in the case of *Kuptz, et al vs. Ralph Sollitt & Sons Construction Co.* (C. C. A. 5th), 88 Fed. 2d 532.

There is a conflict in the testimony as to whether the timber at the back end of the car to which the sheets were nailed had been removed or not; Head testifying that it was, and Petitioner, Kelley, testifying to facts which contradict that statement, in which testimony he was corroborated by the testimony of Appellant's witness, Wimberley.

Regardless of which version is accepted, the fact remains that Kelley testified that while he was working in there that afternoon he could see everything in the car; that he saw the sheets that were nailed in the back; saw those that were not nailed; saw their position, as to whether they were upright or leaning, and if leaning, which way they were leaning. If Head's version is true, and the sheets were completely loose and free to fall, that condition was open and obvious and was seen, or could have been seen by Petitioner by exercise of ordinary care. Petitioner testified that he went in between the sheets and the wall of the car, and to the back end of the car eight or ten times during the afternoon in daylight. If the back support had been removed, there was no reason on earth why he could not have seen it. If it was still there, then equally so, he could have seen it.

Petitioner is bound to have known the effect of gravity and if the sheets of steel were standing loose

with nothing to hold them in position, and in an upright or near upright position, that they might fall against him if he went in between the sheets and the wall of the car. There was no hidden or concealed danger here. Everyone knows that heavy materials unsupported can fall. The condition of these sheets, if they were unsupported, was perfectly visible and apparent.

In the case of *Willis vs. Skinner, et al* (Sup. Ct. of Kansas, 1915), 147 Pac. 60, plaintiff was assisting in unloading heavy marble slabs from a wagon. In doing so, one of the slabs fell over against him and injured him and he sued. The contention was made by the injured claimant, as it is here, that he was inexperienced and did not know of this danger, and should have been warned of it. The Supreme Court of Kansas disposed of the contention in the following language:

> "In the brief, Counsel say that he was a farmer, who, though in the employ of the defendant for a year, had worked for the most part at assisting in unloading grain from a car, and that he had never before assisted in unloading marble slabs. He had, however, assisted in carrying into the building some of the slabs, and he knew their weight. The fact that they were marble instead of iron or some other heavy material can furnish no excuse for his not knowing what every man knows of the laws of gravitation."

See also:

Hyland vs. Seaver (Mass.), 45 N. E. 2d 835.
O'Brien vs. Boston & M. R. R. (Mass.), 164 N. E. 446.

Involved in this question of a safe place to work is also the question of adequate lighting. The trial court in submitting the issue to the jury as to whether Appellant had failed to furnish Appellee a reasonably safe place to work; used the phrase "such as an adequately lighted place."

In view of the undisputed testimony that Wimberley was an independent contractor, and that under the contract, Respondent was not to furnish any tools, equipment or appliances, and the testimony of Head that after Wimberley took over the car there that he did not have anything to do with the unloading (Rec. p. 132), and of Wimberley that after he and Head had made their trade, and he started to unload the steel, that no one else exercised any control over the car (Rec. p. 194), we do not believe that any duty rested on Respondent to furnish lights. Where the owner turns over a job to an independent contractor, and the contractor is to furnish the facilities, and the owner is not obligated to furnish any tools or equipment, we do not believe there is any legal justification for holding the owner liable for failure to furnish lights.

Furthermore, there was no evidence at all to show that Head knew that Wimberley was not furnishing sufficient lights. The testimony shows that Head, according to his own evidence, was last at the car about 6:30, 7:00 or 7:30 o'clock P. M. There was no showing that anyone communicated with Head and told them they did not have sufficient light. The nearest the evidence comes to that is Kelley's testimony that he told Wimberley that the light was insufficient

and Wimberley said he would see Head about it. If Wimberley was advised that the light was insufficient, and believed Head to be under any duty to furnish light, his failure to communicate with Head would be the negligence of Wimberley and not the negligence of Head. Certainly no duty arose on the part of the respondent to furnish light unless they knew or had been advised that there were no lights, or that the lights furnished by the independent contractor were insufficient.

Furthermore, on the question of insufficiency of lights as a failure to furnish a reasonably safe place to work, the evidence shows that that condition was as open and obvious to Kelley as it was to anyone else, and he admits in his testimony that although he knew the light was insufficient, he continued to work. Certainly under these circumstances, it cannot be contended that Respondent was guilty of negligence in failing to furnish the lights.

The cases cited by Petitioner, on pages 40-46 of his brief, are readily distinguishable. All of the cases fall into one of two classes: (1) where the danger was a latent or concealed one, not obvious to the injured party, such as *Amacker vs. Kelley Oil Company*, 132 Fed. 431, *Crowe vs. Continental Oil Company*, 100 Fed. 2d 292, and (2) where the employer is carrying on work concurrently with the independent contractor, and thereby creates danger to the employees of the independent contractor, such as *Montgomery vs. Houston Textile Mills*, 45 S. W. 2d 140, *Galveston & Houston Electric Railway vs. Reinle*, 258 S. W. 2d 803, *West Texas Utilities Company vs. Renner*, 32 S. W.

2d 868. Or (3) cases where the doing of the work inevitably results in injury to a third party, such as *North American Dredging Company vs. Pugh*, 196 S. W. 255. In that case, the dredging company employed an independent contractor to dredge a ditch for them, and the only place where the mateiral gathered up by the dredge could be dumped was on the land of an adjoining landowner. The court of course held that the dredging company could not absolve itself of liability of damages to the adjoining landowner by employing an independent contractor.

We think the last statement in the quotation made by Petitioner from the Amacker case shows how clearly it is distinguished from the case at bar, wherein the Court says:

> "It would serve no useful purpose to canvass and discuss the many authorities appellant and appellee cite. It is sufficient to say that the doctrine appellee invokes does not apply to this case *where the work is static* and precautions against injury from it can be easily taken."

In the case at bar, the work was not static. The danger arose as the sheets were removed and as more and more of them were removed, enabling Kelley to go between the sheets and the side wall of the car. The work was constantly changing as the sheets were removed; and the condition of danger changed as the sheets were removed. The work was not static, and therefore the Amacker case is not applicable.

The case of *Sun Oil Company vs. Kneten*, 164 Fed. 2d 806, is readily distinguishable for the reason that

the facts show that the oil company had three boilers set in series and connected with pipes through which steam might pass from one boiler to another. The oil company employed an independent contractor to clean the boilers. While he was cleaning one of the boilers, the valve on the steam pipe entering the boiler would be cut off so that the cleaning could be done with safety, and the oil company continued to use the other two boilers in the prosecution of their work. In some manner, while he was cleaning one of the boilers, the valve on the steam pipe entering the boiler became open and steam entered the boilers, scalding deceased to death. This was a case where the master was carrying on his work concurrently with the work of the independent contractor, and by a new act of negligence, that is, the opening of or failure to see that the valve into the boiler where the deceased was working was kept closed, the deceased was injured.

The same thing is true with reference to *West Texas Utilities Company vs. Renner*, supra, and *Galveston & Houston Electric Railway Company vs. Reinle*, supra, and *Montgomery vs. Houston Textile Mills*, 45 S. W. 2d 140. Petitioner's statement at the top of page 46 of his brief that,

> "We have here a situation where the work of the defendant was being carried on connectedly and concurring with the work of the independent contractor."

is not supported by anything in the record. The testimony without dispute shows that after Head made his contract with Wimberley to unload the balance of

the steel in this car that he left, and that Wimberley had full charge and control over the car from that time on, and that the respondent was not carrying on any character of work in connection with, or concurring with the work of the independent contractor at this car.

Near the bottom of page 46, Petitioner makes the statement in his argument "one could not look at the steel and see that the supports had been removed since the supports were hidden in between the staves of steel, and would have had the appearance of safety to an inexpeirenced man, such as Kelley."

This statement is likewise unsupported by any evidence in the record. The undisputed testimony shows that the only supports that were on these staves of steel was the 2 x 4 or 2 x 6 at the west end or back end of the car, to which the staves of steel were nailed, and two 4 x 4 at the front end of the staves, or the end towards the center of the car, and that there were no supports between the staves of steel. Counsel for petitioner attempted to make this argument in the Circuit Court of Appeals and Judge Waller called his attention to the state of the record and counsel for petitioner in his first supplemental brief filed with the Circuit Court of Appeals admitted that he was in error in making such a statement and argument. We are surprised that he again now reiterates this same argument.

If he intends by that argument to convey to this court the idea that the 2 x 6 or 2 x 4 at the back or west end of the car was hidden between the staves of

steel, he ignores the testimony of his own client, Kelley, who testified that after he had removed a few of the sheets of steel to where he could get in between the side wall of the car and the staves of steel, that he went back to the back end of the car eight or ten times during daylight for the purpose of loosening either the nails in the sheet of steel where they were nailed to the 2 x 6, or where the bottom edge of the sheet had become wedged into the floor, and he had to pry it loose. Certainly after he had removed, as the evidence shows, some twenty sheets of steel, and had made eight or ten trips back into the back end of the car, he could see whether the 2 x 6 was extending across that car or not. It was a large piece of timber, and he was in there in daylight, and working pulling the nails out of the piece of timber, and it is incredible that any contention should be made that he could not see this support.

Finally, in desperation, counsel for Petitioner, for the first time advanced the idea, at the bottom of page 45 of his brief, that the jury could believe that Head *loosened* some of the supports and not all of them, but that he did loosen enough of the supports to make it possible for the remaining supports to give way, and thus cause the accident.

In the first place, there is no allegation in plaintiff's pleadings claiming that Head loosened the supports, but on the contrary, he alleges in Subdivision E of Paragraph 4 of his trial petition, at page 30, that the supports which had been attached to said tank staves to keep them from falling, *had been removed from same*, and again further on in that same paragraph,

he alleges Head failed to warn plaintiff that *he had removed the supports from said tank staves.* There is not a line anywhere in plaintiff's petition even hinting at a claim that Head had loosened any of the supports, on the contrary, the claim is that he had removed them.

In the second place, there is absolutely no testimony on which the jury could find that what Head did had loosened the supports. Either he removed them, or he didn't remove them. The jury, if they found that he removed some of them, has no evidence on which to base a finding that the removal of some of them loosened the remaining supports.

The claim that the supports had been weakened by Head is without any evidence in the record to support it. The burden would be upon the Petitioner to show by evidence that what Head did do caused a weakening of the supports, that Head knew that they were weakened, and failed to warn Kelley of that weakening. There is absolutely no evidence to support a finding that Head knew he had weakened any of the supports. The evidence showed that for several hours in the afternoon, while Kelley was working in there, that he was lifting up on the sheets of steel at the front and letting them drop so as to pull the sheets of steel loose from where it was nailed at the back end of the car; that on other occasions the bottom end of the sheets at the back had become wedged into the floor, and it was necessary for him to pry them loose. All of this necessarily had a twisting effect on the 2 x 6 at the back of the car to which the sheets were nailed. How could the jury say from the evidence whether

the loosening or weakening of the support was due to what Head did or whether it was due to what Kelley did. The evidence does not make it clear as to which was responsible, and since the burden would be upon the Petitioner to prove by a preponderance of the testimony that what Head did was responsible for the weakening of the supports, or loosening of the supports, then he has failed to discharge that burden, and no verdict of negligence could be rendered against Respondent.

There is another and rather serious objection to this idea of counsel for petitioner, and that is that Petitioner relies very largely in his brief upon the claim that Head had straightened up the sheets of steel so as to make them stand more nearly on edge, and that the danger from it was not apparent to an inexperienced man. If the support at the back was merely loosened or weakened, according to Kelley the sheets of steel were still nailed to that support. If they were nailed to that support, then how on earth could Mr. Head, alone and unaided, without pulling those nails out, straighten up the sheets of steel?

PROPOSITION III

ANSWERING SUBDIVISION "C" OF SECTION VI OF PETITIONER'S BRIEF, pp. 47-49

The evidence was insufficient to justify submission to the jury the issue of negligence on the ground of Head's ordering the work done at night, knowing the light was inadequate and the steel unsafely stacked, and to support a jury finding on such issue; and the Honorable Circuit Court of Appeals for the Fifth Circuit did not err in so holding.

STATEMENT AND ARGUMENT

Petitioner's witness, Head, testified that he made a contract with Wimberley to finish unloading this car. His testimony as to the terms of the contract is as follows:

> "Q. What did you tell the contractor with reference to what you wanted him to do?
>
> "A. I told him I wanted him to finish unloading the car that I had started, that I was going to unload another one, and I wanted it finished that day, and to continue working until he did finish it.
>
> "Q. All right, what happened after that? What happened after you had the conversation with Mr. Wimberley? Did he undertake to unload the car?
>
> "A. Yes sir. He went to work unloading, went and got his truck and men, went to unloading it." (Rec. p. 105.)

Wimberley does not deny the making of the contract for the unloading.

It will be seen from the foregoing that the very inception of the arrangement and the contract between Head, as representative of the Respondent, and Wimberley, the independent contractor was that Wimberley was to finish unloading the car, and that he was to finish unloading it that day, and to continue working until he did finish it.

The fact that Head went back later during the day, either at 4:00 o'clock in the afternoon, as Kelley testified, or at 7:00 or 7:30 in the evening as Head testified, and insisted on the contract being carried out and the work finished that day, is not in and of itself negligence nor does it constitute any interference with the independent contractor. It is, we believe, settled law in this state, that an employer has a right to exercise such control over an independent contractor as is necessary to secure performance of the contract according to its terms, and to accomplish the results contemplated thereby without thereby creating the relationship of master and servant so long as the employer does not destroy the employee's power of initiation, nor undertake to control the employee in the means and manner of the performance of the work.

R. E. Cox Dry Goods Company vs. Kellog, 145 S. W. 2d 675.

Davis vs. General Accident Fire and Life Insurance Corp., 127 S. W. 2d 526.

Carter Publications, Inc., vs. Davis (C. C. A.), 68 S. W. 2d 640 (W. of E. refused).

Lone Star Gas Company vs. Kelley (Tex. Comm. App.), 46 S. W. 2d 656.

According to testimony, the contract was that Wimberley was to finish unloading the car that day, and to continue working until he did finish it. Head's insistence or order that he carry out his contract did not constitute an interference with the independent contractor such as would create the relation of master and servant. The most usual test for determining whether the relation of master and servant or independent contractor or contractee exists is whether the contract authorizes the contractee to supervise and control the details of the work as distinguished from the results.

Furthermore, in order to sustain this ground of negligence we think it was necessary for petitioner to show by the evidence that Head knew that the work was being done without lights or that the lights were inadequate. Head may have thought that at the time he ordered he work to be done that it would be done in the dark, but still in order to hold the Appellant liable as for a breach of duty, it is necessary to be shown that at the very time the work was being done that Head had some character of notice that there were no lights or that the lights were inadequate.

As to the matter of the unsafe stacking of the steel, this, of course, depends on the testimony of Head that prior to Kelley's going to work that he had torn out the supports to which the steel sheets were attached, both at the front and at the back, and that after doing so he straightened up what had already been torn loose from the back end. In that connection, Head testified as follows:

"Q. Any man with ordinary eyes could see that the stuff was in a dangerous condition, as you have described it there, is that right,

"A. After I tore the supports loose, crating, I straightened up what had already been torn loose from the back end, I straightened them up, took them off. When they wasn't used to unloading it would not. * * * A man that wasn't experienced wouldn't notice it being set too straight. The staves were set too straight up and down."

It will be noticed that Head's statement that this was a dangerous condition was qualified by a statement that an experienced man would have noticed it. There was absolutely no evidence to show that Head knew or had any information that Kelley was not an experienced man. If he had been an experienced man, according to Head, he would have noticed that condition. In the absence of some evidence bringing the knowledge home to Head that Kelley was not an experienced man, we think that, since Kelley was a mature man, tendered to do this work by an experienced trucking contractor, that Appelant had the right to assume that he was competent and experienced, and was under no duty to warn him of the claimed unsafe stacking of the steel, and the ordering of Kelley, even with the knowledge that the steel was not safely stacked, to do the work, did not create a liability in the absence of proof that to the knowledge of Appellant's representative Kelley was inexperienced.

PROPOSITION IV

ANSWERING SUBDIVISION "D" OF PARAGRAPH VI OF PETITIONER'S BRIEF (pp. 49-56)

If the supports from the staves had been removed, such a condition was open and obvious, and there was, therefore, no duty to warn petitoner of the removal, and the failure to do so would not constitute negligence, and the Circuit Court of Appeals correctly so held.

STATEMENT AND ARGUMENT

In the beginning of the argument under Subdivision "D" Petitioner makes the statement that "since the evidence showed that the crating and supports were in between the staves, which would hide the supports and make it a hidden and latent defect that they had been loosened in the middle and behind," etc., we submit that there is no evidence sustaining this statement.

We suppose that Petitioner bases this statement upon the tesimony which was set out by him on pp. 34 and 35 of his brief. The statement omits the question and answer immediately following the end of the quoted portion, which are as follows:

> "Q. That is what you call crating?
> "A. Crating and supports." (Rec. p. 136.)

This evidence clearly demonstrates that the only crating and supports in or about these sheets of steel, or staves of steel, were the 2 x 4 or 2 x 6 at the back or west end of the car to which the sheets were nailed, and a 4 x 4 at the top in front or toward the center to

which the sheets were nailed, and a 4 x 4 at the bottom in the front end of the staves, nailed to the floor. The question and answer above quoted makes clear that what the witness meant by the words "crating and supports" referred to these pieces of timber, and them only. We are surprised that counsel again is insisting on the statement that the supports were in between the staves, which would hide the supports, because he made that argument in the Circuit Court of Appeals, and Justice Waller called his attention to the state of the record, and in his first supplemental brief, filed following submission, he admitted his error in that respect.

As to the matter of the sheets of steel hiding the 2 x 6 at the back, Petitioner ignores the testimony of his own client showing that during the afternoon he removed some twenty sheets of steel and that he went in between the sheets of steel and the back end of the car eight or ten times in daylight, and according to his testimony, he pulled the nails out which fastened the sheet of steel to the 2 x 6 at the back on several occasions, and on other occasions he had to go in back there and pry the sheets of steel where the bottom part of the sheet at the back end had become wedged into the floor. Certainly after the sheets of steel had been removed sufficiently for him to go back in between there to pull out nails and pry up the sheets of steel at the back, there would be nothing hidden about the 2 x 6 across the back, and he either saw it, or could have seen it without any difficulty whatever. There was, therefore, no hidden supports which he was not thoroughly familiar with, and saw, or could have, in

the exercise of ordinary care observed long prior to the time that the accident occurred.

On page 51 of Petitioner's brief, he makes the argument that Kelley should have been warned as to the latent and extraordinary danger brought about by the Appellant's representative, Head, "in loosening the supports." As heretofore called to the attention of the Court, there is no evidence showing any loosening of the supports, and we ask the Court to consider the statement and argument in relation to this matter under our Proposition II in answer to Petitioner's Subdivision "B" of Paragraph VI of his argument.

PROPOSITION V

ANSWERING SUBDIVISION "E" OF PETITIONER'S BRIEF, pp. 56-63

The evidence was insufficient to support a finding by the jury that the work was inherently dangerous, and the Circuit Court of Appeals correctly so held.

STATEMENT AND ARGUMENT

In considering the matter of whether the work was inherently dangerous: All that this work involved was the removing from a freight car and the loading onto a truck of sheets of steel weighing from 185 to 285 pounds, each (or according to the estimate of Appellee, 500 pounds). Regardless of which estimate of the weight is correct, it may be admitted that the sheets of steel were heavy and that if one or more of them fell upon a man that injury could be inflicted. But

this does not make the work inherently dangerous, for the same thing is true of the handling of any kind of heavy material.

It may be contended that because the supports had been removed from the steel that this rendered the work inherently dangerous. It is a matter of common knowledge that in unloading heavy machinery and materials that have been shipped in box cars and flat cars it is frequently necessary—in fact almost always necessary—to remove some or all of the supports which immobilized the article and prevented it from shifting during shipment. It is also a matter of common knowledge that, in the process of unloading such heavy material it is almost always necessary to remove the braces and supports which immobilized it during shipment. If the removal of the supports, or crating that is usually and customarily placed around heavy machinery and other heavy materials when it is shipped renders the unloading inherently dangerous, then the unloading and handling of almost any character of heavy and bulky freight would become inherently dangerous.

The evidence of Appellees' witness Head and of Appellant's witness Hobson, shows without dispute that had the unloading of these sheets of steel been handled by the Appellee in the usual and ordinary way this accident would not and could not have happened. According to their testimony, in the usual and ordinary method of handling tank steel, there was no necessity for the workmen to go between the sheets of steel and the side of the car; here the thing which cause the acci-

dent was that Appellee did not unload the steel in the ordinary and usual way but went between the steel and the side of the car and that as a result of his unusual method of doing the work the steel fell and injured him. If Appellee had simply stayed at the front of the steel sheets and pulled the sheets out one by one toward the front of the car, this injury could never have occurred.

An automobile is a heavy piece of machinery and when it is loaded on a freight car for shipment ordinarily supports and blocks are put around it to prevent it from shifting in the process of shipment. These supports and blocks normally have to be removed in order to unload it from the railroad car. Would it be contended that the removal of these blocks and supports would render the unloading of an automobile inherently dangerous work? The same is true of practically all character of heavy machinery such as tractors, pumps, harvesting machinery, telephone and telegraph poles, railroad cross ties, heavy structural steel, and thousands of other types of heavy materials. The work of unloading and handling such heavy materials, if done with ordinary care, is not necessarily dangerous. Of course, the law of gravity still obtains, and men are not always careful and injuries occur, but this does not mean that such work is inherently dangerous.

The loading and unloading and handling of heavy materials of all kinds constitute a large part of the commerce of the United States. To hold that in every case where heavy material is being unloaded that the

removal of the crating, or blocks, or staves, or supports, makes the work inherently dangerous, would impose an almost intolerable burden on commerce and the business of the country requiring that all of the hundreds of thousands of men engaged as stevedores, freight handlers and truck men should each be specially skilled. The unloading of this steel is not inherently more dangerous than the unloading of any other heavy material, yet according to Appellee's contention, based on the claimed inexperience of Appellee in unloading tank steel, there would have to be created a class of specialists in the unloading of every particular class of materials—there would be specialists in unloading pianos; specialists in unloading automobiles; specialists in unloading tank steel; specialists in unloading irrigaton pumps; specialists in unloading tractors; specialists in unloading oil well casing; specialists in unloading structural steel — and if perchance the consignee of some heavy freight employed a trucking contractor to unload some one of these classes and kinds of heavy material, he would at his peril have to see that the trucking contractor sent out a specialist in the unloading of that particular kind of material, or else have the work declared inherently dangerous and held liable for the negligence of the independent contractor.

We have not been able to find a case where the question of whether the unloading of tank steel was inherently dangerous has arisen, but there are a number of illustrative cases which we think establishes the principle applicable, and that under those decisions

this particular work could not be classed as inherently dangerous.

To the average man, the handling of dynamite is considered highly dangerous work, yet in the case of *Joseph R. Foard Company vs. State of Maryland to use of Goralski, et al.*, 219 Fed. 827, where a ship owner employed a stevedoring firm as an independent contractor to load dynamite on the ship and through the negligence of the independent contractor, an explosion occurred, the Circuit Court of Appeals for the Fourth Circuit had this to say:

> "The rule that responsibility is on the independent contractor alone does not apply when at the inception of the undertaking a man of ordinary reason should know that in the natural course of things the work would certainly or probably result in injury to another, unless some distinct and definite precautions be taken, although the details of the work to be done with due care; as, for example, guarding a hole dug in the street, or protecting buildings close to blasting operations from rocks which would probably strike them, or protecting a wall when excavating by it. But the exception does not extend to work which could be surely performed with safety upon the sole condition that due care be exercised in the details of its execution.
>
> "Applying this rule, the Munson Company is not liable. Loading dynamite, gasoline, gunpowder, naphtha, and other inflammable or explosive substances is necessary to commerce and is not a nuisance. The Ingrid (D.C.) 195 Fed. 596, and authorities cited; Ingrid v. Central Railroad Co. (2nd Circuit), 216 Fed. 72, 132 C. C. A. 316.

> There was no distinct and definite precaution to be taken, so as to make sure that due care in the details of the work would make it safe. It was not disputed that dynamite may be loaded with perfect safety, if adequate care be taken against concussion and heat. There was no danger of either, except from the details of the work, and therefore the independent contractor alone was liable."

In the case of *Marvin Briggs, Inc., vs. N. Y. Public Library, et al.*, 20 N. Y. S. (2) 977, the Supreme Court for the Appellate Division, Second Department, held that the removal of a heavy boiler from a truck for the purpose of placing it in a building was not inherently dangerous.

In the case of *Smith vs. Humphreyville, et al.* (C. C. A.), 104 S. W. 495 (writ of error refused), the Court of Civil Appeals for the First District had before it the question of whether the work of raising the roof of a brick building in which bricks were caused to fall by reason of one end of an iron anchor being left fastened in the end of a joist, was not intrinsically dangerous so as to make the owner liable for injury where the work was being done by an independent contractor.

In the case of *Missouri Valley Bridge & Iron Company, et al., vs. Ballard* (C. C. A. O.), 116 S. W. 93, the Texas Court of Civil Appeals for the Second District had before it the question as to whether the work of sinking caissons which resulted in one of the independent contractor's employees suffering from cassions' disease was held not to be inherently dangerous,

but was such a work as could be done without probable injury to any one except in the event of negligence in the manner of doing it.

In the case of *Allen vs. Public Building Co., et al,* (C. C. A.), 84 S. W. (2) 506, the Dallas Court of Civil Appeals held that the work of laying brick and constructing a brick building some 150 feet above the ground was not inherently dangerous so as to render the owner liable for injuries to the employee of a subcontractor.

In the case of *Lone Star Gas Company vs. Kelly* (Comm. of App.), 46 S. W. (2) 656, the Court held that the laying of a pipeline for gas was not so intrinsicly dangerous as to render the gas company liable for injuries to the servant of the independent contractor.

In the case of *Dixon, et al., vs. Robinson, et al.* (C. C. A.), 276 S. W. 770, it was held that excavation preparatory to the erection of a new building was not inherently or intrinsicly dangerous even though the contract included the removal of old brick foundation walls in which the contractor used dynamite for blasting.

In the case of *Holt vs. Texas New Mexico Pipeline Company* (C. C. A. 5th), 145 Fed. (2) 862, this Court held that the dynamiting of rocks in a barren rural section was not inherently dangerous so as to render the pipeline company liable to the servant of an independent contractor who in leveling a ditch following a blast was injured by striking an unexploded dynamite cap.

See also:

Swift & Co. vs. Boling, (C. C. A. 4th), 293 Fed. 279.

McHugh vs. National Lead Company, 60 Fed. Supp. 17.

Ford vs. Commercial Motor Freight, 14 N. E. (2) 354.

Scales vs. Llewellyn, 90 S. E. 521.

O'Neil vs. American Radiator Company, et al., 43 Fed. Sup. 543.

Humble Oil & Refining Company vs. Bell (C. C. A.), 180 S. W. (2) 970 (writ of error refused), 181 S. W. (2) 569.

The last mentioned case held that the rule as to liability of the contractee in the having done of inherently dangerous work did not apply in favor of servants of an independent contractor engaged in the work but applied only to third persons.

None of the cases cited by Petitioner are in point as we understand the law.

Petitioner apparently relies very largely on the case of *Cameron Mill & Elevator Company vs. Anderson*, which he incorrectly cites as being reported in 87 S. W. 282, whereas the correct citation is 81 S. W. 282, for the Supreme Court opinion, and 78 S. W. 8 for the Court of Civil Appeals opinion. In that case, the proof showed that Cameron Mill & Elevator Company, by permission of the City Council, caused to be dug in one of the streets of the city of Fort Worth adjacent to its elevator plant, a hole some 34 feet long, 28 feet

wide and 12 or 14 feet deep, for the purpose of installing some underground storage tanks for fuel oil. Anderson, a boy 13 years of age, attempted to ride his bicycle on the street about 9:00 o'clock at night, and fell into the excavation and was injured. There were no lights or barricades or signals about the excavation, and the street was dark. Cameron Mill & Elevator Company had contracted with McFadden, as an independent contractor, to do the work. The Supreme Court, in affirming the judgment of the Court of Civil Appeals, made the following statement:

> "We were of opinion when we granted the writ of error that the company was liable for McFadden's negligence, and that the Court of Civil Appeals did not err in so holding. We are still of that opinion. The question is ably discussed in the opinion of Mr. Justice Speer, who spoke for the Court in the case, and the conclusion is amply supported by the numerous authorities cited by him. It would therefore be a profitless task to enter upon any extended discussion of the question."

A reading of Justice Speer's opinion for the Court of Civil Appeals, 78 S. W. page 8, shows that he predicated his holding that Cameron Mill & Elevator Company was liable entirely upon the proposition that the digging of an excavation in a public street imposed on the person having the excavation made a non-delegable duty to protect the public in the use of the thoroughfare. As stated by Judge Speer:

> "Appellant cannot cause to be dug in a public street an excavation, the necessary effect of which is to create an obstruction or defect which would

> render the street dangerous for travel, unless properly guarded, without being liable for such injuries as are the direct result of such work. In such case it is no defense that the work was in the hands of a competent, independent contractor."

Justice Speer then follows with the citation of various cases, such as *Thomas vs. Harrington*, 54 Atlantic 286, where the Supreme Court of New Hampshire in considering a case involving injuries by falling into an excavation in the public street, said,

> "Such an excavation in a street is a nuisance, because it renders public travel dangerous, and makes extra precautions necessary for the protection of travelers."

Justice Speer also cites the case of *Robbins vs. Chicago*, 4 Wall. 657, 18 Law Ed. 432. A case of an unguarded area in a public street. And the case of *McCarrier vs. Hollister*, 89 S. W. 862, involving an excavation in one of the principle streets of the city of Sioux Falls. In that case, the Supreme Court of South Dakota held that:

> "The contract in the case at bar contemplated an excavation in one of the principle streets of the city of Sioux Falls. The work contracted for could not be done without creating a condition in the public thoroughfare from which mischievous consequences might reasonably be expected to arise unless preventive measures were adopted. * * * Where the work contemplated by the contract is of such a nature that public safety requires something more to be done, than the mere construction

of the improvement, we think the owner of the property owes a duty to the public to see that proper safeguards are taken, and that, where such precautions are not taken, he should not escape liability for resulting injuries."

Justice Speer cites a number of other cases, all of them involving similar situations.

It is, therefore, apparent that the danger with reference to which both the Court of Civil Appeals and the Supreme Court were writing in the Cameron Mill & Elevator Company case involved cases of obstructions or excavations in a public thoroughfare, as to which the owner causing the excavation to be made owed a nondelegable duty to the public to see that the obstruction or excavation was guarded by sufficient barriers and lights.

In the case at bar, there is no question of the public; it is only the question of an invitee on the premises, as to whom the contractee owed only the duty of warning him against dangers which were latent and concealed.

The case of *North American Dredging Company vs. Pugh*, 196 S. W. 255, cited by Petitioner on page 57 of his brief, is clearly distinguishable on the facts. In that case, the dredging company employed an independent contractor to dredge a channel. In doing so, the company knew that it would be necessary to dump the dredged material on adjoining land. This was done, and the adjoining landowner being damaged thereby, sued. The question of furnishing a safe place to work was not involved in that case, and the work necessarily contemplated the dumping of the dredged material

on the adjoining land, even though the work was performed with ordinary care. The Court, therefore, properly held that the dredging company could not avoid responsibility for such damages as were occasioned thereby by employing an independent contractor to do the work. In the case at bar, if the work had been done in the usual and customary manner, and with ordinary care, no injury would have resulted.

In the case of *American Pacific Whaling Company vs. Kristensen*, 93 Fed. 2d 17, cited at page 60 of Petitioner's brief, the facts were that the whaling company had a harpoon cannon which got out of order. They employed an independent contractor to repair the cannon, and he did so in a defective manner. The defect in the cannon was not observable, and the portion repaired was subjected to great strain because of the great force with which the gun recoiled on firing. No matter how careful the operator of the gun might be, the defects in the gun stem rendered the use of the gun dangerous. In the case at bar, there was no hidden, concealed defect, but the defect was open and obvious to ordinary observation, and if Kelley had performed his work in the usual and customary manner, and with ordinary care, he would not have gone in between the sheets of steel and the side wall of the car, and would not have been injured.

In the case of *Johnson vs. J. I. Case Threshing Machine Company*, 182 S. W. 1089, cited by Petitioner on page 62 of his brief, the facts were that the threshing machine was operated on the highway with a defective spark arrester on the engine, permitting sparks to

escape and set fire to haystacks on land adjoining the highway. No matter how carefully the machine was operated, due to this defective spark arrester, sparks were likely to escape and to cause injury to adjoining property. We think this is clearly distinguishable from the case at bar.

In the case of *Grinnell vs. Carbide & Carbon Chemicals Corporation*, 276, N. W. 535, cited by Petitioner at page 62 of his brief, the chemical company had sold and had installed a gas stove and tanks supplying it, to be filled with an explosive and inflammable gas. The court held that the chemical company could not avoid liability for injuries sustained by the owner of the boat in an explosion as a result of the defective installation on the ground that the representative was an independent contractor, since the nature of the installation imposed a duty on the chemical company, which it could not delegate to a representative. We think the facts of that case distinguish it as an authority in this case.

PROPOSITION VI

ANSWERING SUBDIVISION "F" OF SUBDIVISION VI OF PETITIONER'S BRIEF, pp. 63-82

The undisputed testimony establishing that Petitioner either assumes the risk or was guilty of contributory negligence, the verdict and judgment should have been for the Appellant.

STATEMENT AND ARGUMENT

The Honorable Circuit Court of Appeals for the Fifth Circuit, having found that Petitioner had failed to make out his case, did not specifically pass upon the question of whether Petitioner assumed the risk or was guilty of contributory negligence as a matter of law. If this Court arrives at the same conclusion as the Honorable Circuit Court of Appeals, it is, of course, unnecessary to consider the question of assumed risk or contributory negligence. Since, however, Petitioner has devoted some twenty pages of his brief to the discussion of this question, we think it is not improper that we reply to his contentions.

Before making our reply, we deem it proper to call to the Court's attention, certain statements of fact in Petitioner's argument, which we believe are not supported by the record.

In the first sentence, at page 65, Petitioner argues that Kelley testified that he believed or presumed that it was safe to remove the steel, or else he would not have been requested to do so by the Appellant's representative, Head. We have heretofore, under our pre-

liminary statement, set out the testimony with reference to this matter, and request the Court to here consider that statement as supporting our contention that there is no evidence to show that Kelley was ever requested by Appellant's representative, Head, to unload this steel, but on the contrary, his positive testimony was that the orders given to him were given to him by Wimberley, his employer.

In the last paragraph on page 66, Petitioner argues that "it is to be observed that the danger attendant to unloading materials from boxcars is sufficiently dangerous that rules have been formulated by the American Railway Association as to how boxcars may be safely unloaded."

There is no evidence in the record that any rules have been formulated by the American Railway Association as to the safe unloading of boxcars. If the statement is based on the quotation from *Anderson vs. Southern Railway Company*, it may be called to the attention of the Court that the opinion in that case shows that the rules introduced related to the loading of poles on flat cars, and the requirements as to standards and safety precautions, etc., and there is nothing in that opinion with reference to the unloading of objects from boxcars.

On page 81 of Petitioner's brief, in the fourth line from the top, he makes the statement:

> "Of course, the real proximate cause was the support having been loosened to such an extent by Head that it broke, causing the stave to fall, etc."

There is no proof in the record that what Head did loosened the support, on the contrary, Head's testimony is that he removed the support. This contention, we think, is adequately answered in previous portions of our argument.

Petitioner in his argument cites the case of *United Production Corporation vs. Chesser*, 107 Fed. 2d 850, and copies from the opinion in that case. If the Court will read the first report of that case on the first appeal in 95 Fed. 2d 521, it will find that on the first opinion in the case, 94 Fed. 2d 788, and the opinion on motion for re-hearing, 95 Fed. 2d 521, where the evidence indicated Chesser knew of the breaking of the first gooseneck and the manner of the attachment of the safety chain onto the second gooseneck, the Court had no hesitancy in declaring that under those circumstances Chesser was guilty of contributory negligence. On the second appeal, the evidence showed that Chesser knew nothing about the breaking of the first gooseneck or how the second gooseneck was secured by safety chains.

It may also be noted that in that case the production company contracted to furnish the tools and appliances, including the gooseneck, to the independent contractor for the performance of his work. The gooseneck was defective and broke, causing injuries to Chesser. In the case at bar, the Respondent did not agree to furnish anything, and didn't furnish anything to the independent contractor, and the evidence shows that petitioner knew the condition of the steel and its lack of support, and the danger of its falling.

The case of *Hanson vs. Ponder*, 3 S. W. 2d 426, cited by Petitioner in his brief at page 65, is distinguishable from the case at bar because there was no showing in that case that the injured employee had had any opportunity to see or observe the danger. The accident occurred due to a sudden breaking of the standards. In the case at bar, the fact that the steel had no supports to prevent it falling was perfectly obvious, and Petitioner had worked in the car for several hours in daylight, and could and must have seen the lack of support.

The case of *Motejl vs. Greenwood, et al*, 138 Pac. Rep. 2d 216, cited on page 67 of Petitioner's brief, is likewise clearly distinguishable from the case at bar. The facts of that case were that Plaintiff was preparing to unload logs from a truck and crawled under the truck to make certain attachments used in unloading. The driver of the truck, an employee of defendant, Greenwood, knowing the logs had been disarranged while in transit, and knowing Plaintiff was under the truck, unloosed the binder chain holding the logs in place, thus permitting them to roll off and strike plaintiff. The binder chain was unloosed while plaintiff was under the truck, and without warning to him, and he had no knowledge it had been loosed. In the case at bar, the removal of the supports was perfectly open and obvious to observation by petitioner over the period of several hours, and the danger of the steel falling was perfectly apparent to petitioner when he went in between the steel and the side wall of the car.

The case of *Phillips Petroleum Company vs. Hooper*, 154 Fed. 2d 743, cited by Petitioner at page 69 of its

brief, is, we think, distinguishable on the facts. Hooper was truck driver for a construction company, and drove his truck into one of the Phillips filling station to have some gasoline poured on a load of asphalt he was carrying. He had warned the operator of the station on former occasions when doing this same kind of work to turn off the gas stove in the station. On the occasion in question the stove was not turned off, and it ignited the gasoline fumes, causing an explosion injuring the plaintiff. The evidence showed without dispute that on the day of the accdent the weather was warm, and Hooper did not know or have reason to suspect that the gas stove was burning. In the case at bar, Petitioner knew that the steel was standing on edge without supports, and that there was nothing to prevent it from falling on him when he went in between the steel and the side wall of the car. While, as the Court said, in the Phillips Petroleum Company case, Hooper was not required to anticipate that the premises were dangerous, yet Petitioner in the case at bar could not shut his eyes to visible dangers that were patent and obvious.

In the case of *McAfee vs. Travis Gas Corporation* 153 S. W. 2d 442, cited by petitioner at page 69 of his brief, Plaintiff an employee of Federal Petroleum Company, at the request of an employee of the gas corporation, went to its pipeline to point out some leaks. While doing so, Woods, the employee of the gas corporation, struck a match causing an explosion in which Plaintiff was injured. The facts showed that while McAfee knew that the gas was leaking, he had no reason to anticipate that Woods, an experienced employee of the gas com-

pany, would do so dangerous a thing as striking a match near to said leak.

In the case of *American Stores Company vs. Murray*, 87 Fed. 2d 894, cited by Petitioner at page 69 of its brief, the American Stores Company had a store with some steps, and there was a loose riser on the steps, which caused the plaintiff to fall. The opinion shows that the defect in the riser on the step was not patent, open or obvious, as was the case with the condition of this steel and its lack of supports in the case at bar.

In the case of *Holmes vs. Ginter Restaurant*, 54 Fed. 2d 876, cited by Petitioner at page 69 of its brief, a customer fell on the slippery floor of the restaurant. The slippery condition of the floor was known to the proprietor, and there was sufficient evidence to raise the issue that it was not known to the plaintiff, who had just entered the restaurant. In the case at bar, Kelley had been working in the car removing this steel for some hours in broad daylight before the accident, and necessarily knew the situation as to whether the steel had any supports, or whether it was standing unsupported and free to fall.

In the case of *Gulf C. & S. F. Ry. Co. vs. Gascamp*, 69 Tex. 545, 7 S. W. 227, cited and quoted from in Petitioner's brief at pages 70-71 of his brief, the evidence showed that Gascamp attempted to cross a bridge constructed by defendant on a portion of the public road crossing its right-of-way; that he knew the bridge as not in good repair, but that it was crossed by travelers in wagons and on horseback, and was the only practicable crossing for him in the direction he was

traveling. The Court held that if a traveller has no other convenient way, the mere fact that he takes the chances of a known danger and attempts a passage, is not controlling proof of his negligence. We do not think this case applicable to the case at bar.

In the case of *Memphis Cotton Oil Company vs. Gardner*, 171 S. W. 1082, cited and quoted from at pages 72-79 of Petitioner's brief, we think the quotations clearly show that it is distinguishable from the case at bar. In that case, the relationship of master and servant existed between the plaintiff and the cotton oil campany, whereas in the case at bar, the relationship between Petitioner and Respondent was that of an invitee upon the premises of the owner or controller. In the second place, the quotation from the opinion shows that Gardner was injured in a short time after beginning the work, and without knowledge on his part of the danger caused by the insecure stacking of the sacks of meal. The last four or five lines of the quotation in that case, at the bottom of page 77, is to the effect that the evidence in the case tended to show that Gardner had not been working in removing the sacks for not exceeding thirty minutes when the accident occurred. In the case at bar, Petitioner had been working in the car in broad daylight for several hours prior to the accident, and therefore had ample opportunity to see and observe the danger.

Furthermore, the last sentence on page 78 of Petitioner's brief, in the quotation from that opinion, it is affirmed by the Court that the Appellee was not shown to have conducted himself out of the usual and

ordinary way of performing the work, whereas in the case at bar, the evidence is without dispute that the usual and ordinary way of removing the sheets of steel was to pull them from the front out toward the center of the car, and that the going in between the sheets of steel and side wall of the car was not the usual and ordinary method of unloading. The undisputed testimony was that if the raising of the sheet of steel and dropping it down did not extract the nail at the back end, that the usual and customary way was for the workman to go over the tops of the steel and pull the nail out at the back.

The case of *Herndon vs. Halliburton Oil Well Cementing Company*, 154 S. W. 2d 163, is inapplicable to the present situation, because respondent does not here seek to apply the rule of assumed risk, but rather the doctrine of volenti non fit injuria, as recognized in the case of *United Production Company vs. Chesser*, 95 S. W. 2d 521, and *Southern Pacific Ry. vs. McCready, et al.*, 47 S. W. 2d 673.

The case of *City of Beaumont vs. Silas*, 200 S. W. 2d 695, cited by Petitioner at page 79 of its brief, is clearly distinguishable in that first, the relation of master and servant existed between the City of Beaumont and Plaintiff. The opinion does not show how long the plaintiff had been in the room, and handling the sacks at the time he was injured, and the opinion does not undertake to discuss in any way the facts, which it was claimed raised the issue of contributory negligence in that case.

The case of *Texas & Pac. Ry. Co. vs. Day*, 197 S.

W. 2d 332, cited at page 80 of Petitioner's brief, is, we think, distinguishable in that it was a crossing accident, and the plaintiff claimed that after one train passed he waited and looked for another train, and then started to cross and was struck. It is apparent from plaintiff's testimony in that case that he did look and exercise some care for his own safety, and the Court held that this made an issue for the jury. In the case at bar, Petitioner worked all afternoon in day-light handling the steel, and necessarily discovered that the steel was standing on edge and was without support. Knowing these facts he deliberately and for no adequate reason, put himself in the position of danger by going between the steel and the sidewall of the car, which was not the usual and customary method of handling steel in a car of this kind.

The case of *Shubert vs. City of Dallas*, 190 S. W. 2d 721, cited by Petitioner at page 81 of his brief, was a case where the city was improving a street in front of Plaintiff's residence, and left a pile of dirt in her path from her house to the street, over which she fell while going out to her car in the dark. We think the case is distinguishable because the use of a highway or street or sidewalk by a traveller, even with knowledge of its being obstructed, is not conclusive of negligence due to the fact that one travelling upon a street or sidewalk has the right to presume that the obstructions have been removed, or if not, that barriers or lights will be placed around them to give warning. Such a rule does not pertain as to private premises. In the second place, the evidence failed in that case to show actual knowledge by plaintiff of

the existence of the obstruction, whereas in the case at bar, Kelley could not have avoided knowing of the lack of supports for the steel, and the possibility of its falling.

Whether we consider that assumed risk is not available as a defense except as between master and servant, and not as between the servant of an independent contractor and the contractee, yet under the rule announced by this Court in *United Production Corporation vs. Chesser, et al* (C. C. A.), 95 Fed. (2) 521, we think Appellant here was entitled to the defense of assumed risk under the ordinary meaning of "take upon oneself" as expressing the idea that the person injured has voluntarily taken on himself the risk and known danger which he could have avoided. In other words in such a situation the maxim Volenti non fit injuria is applied.

See also *Southern Pacific Company vs. McCready, et al* (C. C. A. 9th), 47 Fed. (2) 673, as relating to the application of this principle, and as related to the matter of contributory negligence, as a matter of law, we call the Court's attention to the following situation in the record:

The only witness who testified to the removal of these supports was Appellee's witness J. O. Head, who testified (Rec. pp. 106-107) that before Kelley went to work that he, Head, had torn out the supports and braces on this steel, leaving it free. He elaborated somewhat on his testimony on cross examination, testifying that he took out the two timbers at the front end of the steel (Rec. p. 130), and that when he did

so it was perfectly obvious that nothing was holding the front of the staves, and that anybody could see that.

That he also tore out the 2 x 6 or 2 x 4 at the back end of the staves (Rec. p. 133), that he crawled over these staves and took the 2 x 6 out of the back or west end of the box car and pulled out all of the nails that attached the staves to that 2 x 6. (Rec. p. 134.)

Appellee testified on direct examination that at the time of or just immediately before the accident, that he had gone to the back end of the car to pull the nail out of the sheet of steel, and was coming to the front end of the car when the steel fell and caught him. (Rec. p. 49.)

That in unloading the steel after he went to work that the way they got the steel out, he and the Mexican would put hooks in the holes in the sheets at the front end and pull them out and drag them over to the door. That the way they broke them out and pulled out the nails was to put the hook in a hole close to the bottom in the front end and pull the sheet of steel up and break it loose at the other end of the box car and drag it out. That there was a nail driven into the 2 x 4 timber at the back end of the car. That he saw that situation when he started to work and knew the 2 x 6 was back there, and that he had to handle the sheets from the front. (Rec. pp. 64-65.) That some of the sheets were nailed to the 2 x 4 at the back and some were not and that he saw those that were nailed and saw some that were not nailed in the trips that he made back there in broad daylight. (Rec. p. 67.) That for several hours there in the afternoon as he worked he could see that

some of the sheets were nailed to the 2 x 4 and some of them were loose. (Rec. p. 68.)

Appellant's witness, Wimberley, testified that, after he made the trade with Head to unload the car that he went over with Kelley to the car when he started to work and that the timbers in front of the steel were still there, and Kelley and the Mexican helper pulled one of them out with a winch line, and pried up the one on the front with a bar. (Rec. p. 185.)

That the way they, Kelley and the helper, got the steel loose from the cross piece at the back end of the car, they had hooks and would pull the sheet of steel out and pull it loose from the nail. (Rec. p. 186.) After Wimberley testified to this Appellee Kelley did not take the stand and deny his testimony.

If Head's testimony is not true, and Appellee's and Wimberley's version is correct, then the steel at the time Kelley went to work was still fastened to the timber at the back end, or west end of the car, and there would be no support in the evidence for a finding by the jury that the supports had been removed from the steel.

If, on the contrary, Head's testimony is accepted as true, then Kelley's evidence as to the reason for his going back into the back end of the steel immediately before it fell on him is wholly untrue. He said that the reason he went back there was to pull out the nails. If, as Head says, the nails and supports had already been pulled out, then Kelley has no believable explanation for going back in there, and is in the attitude of voluntarily putting himself in danger for no reason at all.

Appellee cannot have his cake and eat it too; he cannot rely on Head's testimony to establish liability for the removal of the supports and failure to warn Kelley of that fact, and yet excuse Kelley of contributory negligence by saying that he went back to pull the nail out when, according to Head, no such nail was there.

On the matter of contributory negligence, the evidence, without dispute, showed from both Appellee's witness Head and Appellant's witness Hobson, that the usual and customary way of taking the sheets out of the car was for the workman to take their hooks and raise the front end of the sheet up about a foot and come down on it, and that would break it loose from where it was nailed at the back end of the car, and then simply pull it out. (See Hobson's testimony, Rec. pp. 172-173.) Head testified that, the ordinary way of getting the staves out would be to take the hooks at the front end and put them in the hole in the chine (or flange) and that sometimes a man would have to get on top of the staves and break the nail (Rec. p. 136), and ordinarily in unloading that kind of steel it would be unnecessary to go back toward the back end of the car. (Rec. p. 136.)

If we accept Appellee's testimony and Wimberley's testimony as true, these sheets were still nailed to the 2 x 4 or 2 x 6 at the back end of the car, and the ordinary and customary way of unloading these sheets was to either raise up the front end and lay it down and break the nail loose at the back end, and then pull the sheet of steel out, and that if they could not get

the nail out in that manner the proper, ordinary and usual way was to go over on the top of the steel sheets and pull the nail out at the back.

If we accept Head's version that he had already removed the timber at the back and the nails fastening the sheets at the back to the timber, then the only thing necessary for Kelley and his helper to do was to put their hooks in the holes in the flange at the front end and pull the steel out, and there was no necessity, or occasion, for either of them to go to the back end of the car, and between the sheets of steel and the side wall of the car.

It is true that Kelley testified that, during the afternoon when they were unloading the car, that he, or his helper, had gone back in there several times; that the flange at the back end was sometimes stuck into the floor of the car, and one of them would have to go back and dig it up (Rec. pp. 66-67); but on the occasion immediately before the accident he did not claim that he went back there because one of the sheets of steel was stuck in the floor but said he had gone back there to pull the nail out of the sheet of steel. (Rec. p. 49.)

It will also be borne in mind that so far as the lighting conditions are concerned, that Kelley testified that when he went back to the car to work around 9:00 or 9:30, that he himself trained the light on the truck to shine in the car, and that he went in and unloaded two or three sheets and was continuing his work despite the fact that he knew he did not have adequate light. (Rec. pp. 81-82. See also Rec. p. 78.)

If the light was inadequate and that rendered the work dangerous, Kelley admittedly knew it. If despite that, he continued to work he was not exercising ordinary care for his own safety.

It will also be borne in mind that Wimberley testified, and it was not denied by Kelley, that he told Kelley that whenever he got a few sheets of steel out to push it over to be sure it did not fall on him. (Rec. p. 189.) While Kelley denied that he was warned he does not claim or testify that Wimberley did not give him said instructions or that he undertook in any way to obey these instructions, and if Head's statements are true that all the nails had been removed from this steel, there was nothing on earth to prevent Kelley from shoving the steel back so that it would not fall on him, but this he did not do.

We submit that evidence establishing that Appellee voluntarily assumed the risks incident to this work, including the fact that the steel was without supports and that the lighting was inadequate and the fact that the undisputed evidence showing his contributory negligence, leaves the verdict and judgment for Appellee without support in the testimony.

United Production Corporation vs. Chesser, et al. (C. C. A. 5th), 94 Fed. (2) 790, 95 Fed. (2) 521.

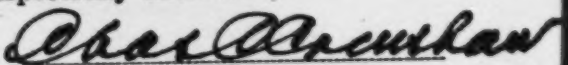
Southern Ry. Co. et al. vs. Edwards (C .C. A. 5th), 44 Fed. (2) 526.

Anderson, et al., vs. Southern Ry. Co. (C. C. A. 4th), 20 Fed. (2) 71.

CONCLUSION AND PRAYER

We believe that the foregoing authorities and statement of facts demonstrate the decision and judgment of the Honorable Circuit Court of Appeals for the Fifth Circuit was correct, and that the petition for writ of certiorari should be denied.

Respectfully submitted,



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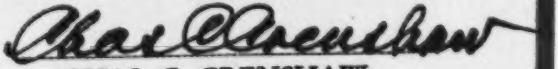
Of Counsel on the Brief

A copy of the foregoing brief has been furnished to the Honorable John J. Watts of Odessa, Texas, attorney for Petitioner.



CHAS. C. CRENSHAW